

## I. Wildlife category CEA comments in full:

### Wildlife

- i. The Administrative Record identifies an avian management plan. At this time, the management plan is conceptual, has not undergone agency review and essentially does not exist; therefore the extent and effectiveness of mitigation cannot be substantiated. The Dewey Burdock Project proposes a plan to mitigate impacts to avian species during operations, however, special emphasis is given to bald eagles. Monitoring wells, a processing plant, production well fields, disposal facilities, and a supply water well are all currently proposed within a buffer established for an active bald eagle nest. During the life of the project, seasonal restrictions and unspecified mitigative measures are proposed for the facilities. The Administrative Record does not analyze the viability of seasonal mitigation measures on continuously operated facilities. Analysis also does not consider the questionable effectiveness of seasonal mitigation during times of urgent maintenance or situations requiring emergency repairs on continuously operated facilities. Mitigation measures also rely on individual eagle tolerance; as tolerance is known to vary greatly among individuals. Unsuccessful mitigation risks a disturbance take. Analysis in the Administrative Record does not recognize the necessity of bald eagle take permitting. P. 354-55
- ii. Administrative Record fails to recognize or establish the relationship between the site's prairie dog colonies and avian management. The site's prairie dog colonies are the presumed forage base and home range for bald eagles and other avian species. The Administrative Record does not describe the project's direct and cumulative effects on prairie dog colonies, and collateral impacts on bald eagles and other avian species.
- iii. Authorization of UIC activities on the site provides a reasonable risk of unpermitted bald eagle disturbance take. Seasonal mitigation in the discernible method of nesting bald eagle protection but USFWS take permitting is done "only" if necessary. Obtaining a permit out of necessity implies a response to a situation that may already has constituted disturbance or take. Operation of UIC permits in important bald eagle habitat, and the uncertainty associated with a seasonal mitigation strategy continuously operated facility will result in the probability of take. The Administrative Record does not assess the probability of bald eagle take during project operation. P. 355
- iv. Section 14.2, "Species of State and Tribal Interest: The Short-Horned Lizard" does not describe species of state interest. For a complete listing of state threatened, endangered or rare species see: [ [HYPERLINK "http://gfp.sd.gov/wild%20life/threatened-endangered/.%20P.%20355"](http://gfp.sd.gov/wild%20life/threatened-endangered/.%20P.%20355) ]
- v. The EPA mentions the presence of a short-horned lizard, which is rare and protected in South Dakota, in the proposed project area. After stating that the species is "important in some tribal cultures," it offers the solution "Once construction activities begin at the site, the EPA expects that the [sic] any short-horned lizards that were in the area will seek less disturbed locations." This is pure conjecture, without any back-up information on the size or habits of the lizards. Are they territorial, or is it species-appropriate for them to move? Are they large enough to move fast enough to out-run a bulldozer or pick-up truck? Or are they, in reality, unprotected? 482

- vi. Species other than animals are not considered in this discussion. Plants cannot simply move off the site. Some of them are important to tribal practices and customs, such as medicinal plants and timsila (prairie turnips). Full scientific information should be gathered, and full analysis must be done, for non-animal species. Species that are important to the long-term residents of the area -- the Lakota, Cheyenne, and other native nations -- require special protection. There is already information on protection of some species in project documents that could serve as a base for part of this analysis. However, a full and independent analysis is also needed. 482
- vii. This analysis would include close consideration of the opinion of the South Dakota Department of Game, Fish and Parks. This opinion was stated in an October 17, 2008, letter written by Stan Michals. Michals said that exploratory activity should not take place on some parts of the project area between February and August (inclusive) due to the presence of a bald eagle nest (a state-protected bird) and a redtail hawk nest. Mining, deep disposal wells, land application, and reclamation, which are more long-lasting and disruptive than exploration, should clearly also not take place during those seven months of the year in raptor nesting and other protected areas.
- viii. The sturgeon chub must be included in the discussion of wildlife concerns. It is present in the Cheyenne River and may be threatened or endangered in areas downstream from the proposed mine. Additional silt, heavy metals, and radioactive materials would be potential threats.
- ix. • A Fish and Wildlife Service ("FWS") raptor monitoring and mitigation plan has not been developed despite confirmed raptor activity in the project area. 489
- x. • FWS permits to avoid and mitigate impacts to Bald Eagles' use of three existing Bald Eagle nests. 489
- xi. • Ongoing development of mitigation plans for listed species 489
- xii. NRC's FSEIS reveals that active bald eagle and other raptor nests are known to exist in and near the proposed project site. FSEIS at 4-147, accord at 3-46 ("Five confirmed, intact raptor nests and one potential nest site were observed within the proposed project area, and the applicant identified two additional nests within a 1.6-km [1-mi] radius of the study area (Powertech, 2009a)"). EPA's SDWA permitting thus is likely involves prohibited take under federal wildlife laws, including direct and cumulative impacts on normal breeding, feeding, and/or sheltering behavior of bald eagles due to at least one confirmed, active nest in the project area. FSEIS at 3-46 to 3-47. Similarly, MTBA-listed raptor species, including "red-tailed hawk, American kestrel, and northern harrier [which] were the most commonly seen raptor species in the proposed project area and will be the primary raptor species impacted by project activities." FSEIS at 4-149. EPA's SDWA duties independently trigger compliance with federal wildlife laws before any decisions can be issued on Powertech's application. 491

## **II. ESA comments that are also stated in CEA section:**

- a. Powertech requests clarification on the basis of a 1-mile avoidance buffer for the whooping crane, rufa red-knot and northern long-eared bat and how this was determined to be protective. Such a buffer appears to be much greater than typical wildlife buffers and was formulated without basis within the documents provided. From the documents provided, it appears that the buffer was arbitrarily increased from 1/4 mi to 1 mile by EPA and applied to other species arbitrarily. Powertech

recommends that a mitigation plan be allowed to be developed upon observation of these species. Such a plan could involve various strategies to avoid a take. PT Class III 104 and Class V 62

b. Powertech requests modification of the requirement that all operations and construction must cease within 1 mile upon sighting a whooping crane, rufa red-knot or northern long-eared bat. In particular, active operations cannot be immediately ceased as this could endanger protection of USDWs as operations are required to be manned. As well, this could create serious issues with compliance conditions within the Class III permit, for example, the need to continuously maintain a bleed on the wellfield. Powertech recommends that a mitigation plan be allowed to be developed upon observation of these species. Powertech questions the authority of the EPA to enforce such requirements. Such conditions are enforceable under the South Dakota DENR Large Scale Mine Permit, and Powertech believes these requirements are better applied in this fashion, with direct interaction with SD GFP, where trained wildlife biologists can determine an appropriate approach. PT Class III 105 and Class V 63

c. Class V IX.B.5 - If supplemental lighting is used during construction or operation, the lights must be directed and/or sheltered to minimize the amount of light escaping the work or project site. This condition appears arbitrary and not tied to the known presence of wildlife of concern. Powertech suggests that this condition be modified so that if a whooping crane, rufa red-knot or northern long-eared bat have been confirmed at the site by trained wildlife biologist, then such a condition would be applied if deemed appropriate by a trained wildlife biologist. PT Class V 64

d. From the biological assessment documents provided, it does not appear that the EPA sought specific input on the parameters of mitigation for the whooping crane and rufa red-knot prior to creating permit requirements. Powertech requests clarification on the Section 7 consultation with the Secretary of the Interior (U.S. Fish and Wildlife Service). Are the mitigation measures described in the draft permit a result of this consultation? If not, Powertech requests that this section be revised once consultation has been completed. PT 106

e. Powertech requests clarification on the frequency of the motion-activated camera monitoring. Powertech requests clarification that additional monitoring will not be required if the shaft entrance is covered following a determination that no bats are inside the shaft. PT 107